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No. 06-1221

In the Supreme Court of the United States

SPRINT/UNITED MANAGEMENT COMPANY, PETITIONERS

v.

ELLEN MENDELSOHN, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF FOR EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus will address whether a district court must admit "me, too" evidence - testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

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INTEREST OF AMICUS CURIAE[1]

The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management organizations in the United States. It is comprised of nearly 4,000 companies of varying sizes in nearly every industry, employing in the aggregate approximately two million employees.

Because of its collective experience in employment relations matters, including its appearance as *amicus curiae* in dozens of cases in state and federal court, including many significant employment discrimination cases, the Employers Group is uniquely positioned to assess the impact and implications for employers of the legal issues presented in cases such as this one.

All of the Employers Group member organizations are subject to federal employment discrimination laws. All have policies and practices which prevent discrimination in their workplaces. In spite of this commitment to a discrimination-free employment, many of the Employers Group members have been victims of false claims of discrimination. Often these claims are based solely on employee conjecture and speculation. However, the defense of even the weakest of these claims has cost Employers Group members tens of thousands, and in some cases, millions of dollars. Employers Group members have a vital interest in both protecting their workforces from employment discrimination and in protecting themselves, their managers and their supervisors from claims of discrimination based upon spurious evidence.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of all *amicus curiae* Briefs. Their stipulations has been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, Amicus state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than Amicus, made a monetary contribution for the preparation and submission of this brief.

STATEMENT

Respondent, Ellen Mendelsohn, alleged that she had been unlawfully selected for layoff by her supervisor, Paul Reddick, because of her age. She offered the testimony of five ex-employees of the company. Each ex-employee was prepared to testify that in their own opinion they had been laid off because of their age. None of the five witnesses reported to Reddick or even worked in the same group. They each admitted that they did not know Reddick and had no information about Mendelsohn's layoff. Three of the employees, Hoopes, Wood, and Miller, were prepared to testify they had heard ageist remarks by other Sprint supervisors. JA 343a - 345a, Hoopes was prepared to testify that he had been replaced by a younger employee, and that his post-RIF job applications to Sprint had been rejected. JA 343a - 344a. Wood also was prepared to testify that she had seen another supervisor with a spreadsheet with ages listed on it. JA 344a - 345a; Borel was prepared to testify that he had been given a false evaluation by his supervisor, that he had been told by a manager that he had been banned from working at Sprint, and that he has seen another employee harassed because of her age. JA 346a - 347a.

Defendant objected to the evidence on the grounds that the testimony was unfairly prejudicial, confusing and a waste of time. The District Court permitted the testimony of any persons who were similarly situated in regard to their own layoff, but excluded the testimony of non-similarly situated "other employees ... from coming in and saying, I was RIF'd, it was because of my age." Pet. App 18a.. Because none of the five employees was supervised by Reddick or offered testimony about Reddick, they were not similarly situated and were not permitted to testify.

The Tenth Circuit held that it was an abuse of discretion for the district court to exclude the testimony of the five other employees because the testimony was evidence of a pattern and practice of age discrimination by the company. However, there is no legitimate pattern and practice

of age discrimination claim in this case. The only evidence of a pattern and practice claim, besides the testimony of the five witnesses, is that a few employees over 40 were laid off -- out of 15,000 who were subject to layoff -- and that layoff lists included protected information, including age.

SUMMARY OF ARGUMENT

Given the plaintiff's failure to assert a legitimate pattern and practice claim, the only purpose of "me too" evidence was to show the character of the corporate defendant. Yet FRE 404 (b) prevents the use of "crimes, wrongs and acts" committed by other persons to show the character of the defendant. Evidence that other supervisors may have discriminated against other employees based on age, even if true, does not make it more or less likely that Reddick discriminated against Mendelsohn. The only effect of such evidence would be to besmirch the character of the corporate defendant, create jury sympathy, and inflame the jury to punish the corporation.

Moreover, even assuming that Plaintiff had a legitimate pattern and practice claim, it was within the wide discretion of the district court to determine whether or not "me too" evidence should be admitted. The Tenth Circuit decision creates a *per se* rule that "me too" evidence must be admitted in employment discrimination cases unless the district court finds that the evidence is "cumulative" or "marginally relevant." In the Tenth Circuit, a district court must admit "me too" evidence even if the court finds the evidence unfairly prejudicial, confusing or a waste of time. The Tenth Circuit "me too" rule thus conflicts directly with FRE 403, which gives discretion to the district court to exclude evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

ARGUMENT

I. GIVEN THE ABSENCE OF A VALID PATTERN AND PRACTICE CLAIM, THE DECISION BELOW STRAYS FROM THIS COURT'S TEACHINGS THAT IN EMPLOYMENT DISCRIMINATION CASES THE FOCUS IS ON THE MOTIVE OF THE ALLEGED DISCRIMINATOR, NOT ON EMPLOYEE CONJECTURE ABOUT DISCRIMINATION BY OTHER SUPERVISORS

For at least the last 30 years, this Court has held that the focus in discrimination cases is on the motive of the alleged discriminator. In both Title VII cases and in Age Discrimination in Employment Act ("ADEA") cases, the Court has held that "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper* v. *Biggins*, 507 U.S. 604, 610 (1993); *Reeves* v. *Sanderson Plumbing Product, Inc.*, 530 U.S, 133, 141 (2000); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) ("[T]he plaintiff is required to prove that the defendant had a discriminatory intent or motive"). Consistent with this teaching, the Court has also established an evidentiary scheme, the end result of which is the determination by the trier of fact of the alleged discriminator's true motive. *McDonald Douglas* v. *Green*, 411 U.S. 792 (1973). Unfortunately, by requiring the admission of "me too" evidence absent a valid pattern and practice claim, the Tenth Circuit failed to follow this substantial body of law, including the Court's teaching that the critical factor in employment discrimination cases is to determine the intent of the alleged discriminator, not the opinions of non-similarly situated employees that their supervisors discriminated against them.

The decision also conflicts with FRE 404(b) by permitting the use of "acts, wrongs and crimes" committed by someone other than the defendant or the alleged discriminator to besmirch character.

A. In The Absence Of A Valid Pattern And Practice Claim, "Me Too" Evidence From Other Employees About Discrimination By Unrelated Supervisors Is Not Relevant Evidence In Determining The Motive Of The Alleged Perpetrator

1. Federal Rule of Evidence §401 provides that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. There is nothing about the testimony of the "me too" witnesses that makes it more or less probable that Reddick's layoff decision was motivated by Mendelsohn's age. Testimony about employee's personal beliefs that that they were the victims of discrimination, ageist comments by other supervisors, another supervisor's layoff list, and an employee's belief that another supervisor harassed an unrelated employee provides no insight into Reddick's state of mind when he selected Mendelsohn for layoff.

In short, in the absence of a pattern and practice claim, "me too" evidence, even if accurate, has no probative value. Whether an individual supervisor engaged in discrimination is not affected by whether or not *other* supervisors violated the law. In the individual supervisor discrimination case, "me too" evidence is nothing more than slander by association: If other supervisors did it, then you must have done it too.

2. For similar reasons, admission of such evidence violates Federal Rule of Evidence §404(b), which provides that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." This Court has discussed this Rule in terms of an individual's other acts and held that the previous wrongs of one actor may be admissible to show that person's intent. *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988). However, the Court has taught that testimony about a third party's "crimes, wrongs and

acts" is not relevant regarding the intent of an unrelated defendant. "[T]he [plaintiff] may [not] parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. . . . In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Id.* 689 (emphasis added).

Here, the finder of fact obviously could not conclude that Reddick, "was the actor" with respect to the incidents described in the "me too" evidence. Accordingly, the district court was correct in excluding such testimony from non-similarly situated witnesses, and the Tenth Circuit was wrong to require its admission.

II. "ME TOO" TESTIMONY IS UNFAIRLY PREJUDICAL, CONFUSES THE ISSUES, MISLEADS THE JURY AND FORCES THE DEFENDANT TO PROVE THAT IT DID NOT DISCRIMINATE AGAINST NON-SIMILARLY SITUATED EMPLOYEES WITH UNRELATED CLAIMS.

A defendant faced with "me too" testimony is compelled to counter each "me too" claim. Failure to provide compelling evidence that it did not discriminate in regard to any one of the "me too" claims leaves the defendant vulnerable to a trier of fact concluding that, "if they did it once they probably did it again."

In this case, if the "me too" evidence had been admitted, Sprint would have had to refute the testimony of Hoopes, Wood, and Miller that they had heard ageist remarks by other Sprint supervisors JA 343a - 345a, the testimony of Wood that another supervisor had a spreadsheet showing ages which the supervisor may have considered in making his layoff decisions, JA 344a - 345a, the testimony of Borel, that he had been given a false evaluation, another manager had informed him that he had been banned from working at Sprint and that he had witnessed another employee being harassed because of her age. JA 346a - 347a

and the testimony of Hoopes that he had been replaced by a younger employee, and that his post-RIF job applications to Sprint had been rejected. *Id.* JA 343a - 344a. None of that testimony would have provided any probative evidence regarding Reddick's motives in laying off Mendelsohn. However, Sprint would have had to rebut the testimony of each of those witnesses or face the argument that if they did it to them they must have done it to Mendelsohn too.

In addition, even if the defendant rebuts each "me too" witness, such testimony still leaves with the trier of fact a suspicion that "if there is smoke, there must be fire." Here, by parading a number of other unhappy witnesses before the jury, the Plaintiff would effectively deliver the message that Sprint is a bad company with unhappy employees. In fact, the sole purpose of the "me too" evidence is to besmirch the character of the corporation, create jury sympathy and encourage the jury to punish the corporate defendant.

Any corporate defendant faced with "me too" evidence in these circumstances has a Morton's fork dilemma of either spending hundreds of thousands of dollars in trial costs attempting to convince the jury that it's supervisors and managers are committed to a discrimination-free workplace or agreeing to an extortionate cost of defense settlement. The District Court was correct in excluding the testimony.

III. THE TENTH CIRCUIT DECISION IMPROPERLY TAKES AWAY THE DISCRETION OF THE TRIAL JUDGE TO DETERMINE IN PATTERN AND PRACTICE CASES WHETHER "ME TOO" EVIDENCE IS UNFAIRLY PREJUDICIAL, OR CONFUSING, OR MISLEADING OR AN UNDUE WASTE OF TIME

Even if there were a legitimate pattern and practice claim in this case, the Tenth Circuit's decision improperly intrudes into a district judge's prerogative to exclude oth-

erwise admissible evidence under Rule 403. This Court has taught that in pattern and practice discrimination cases "me too" evidence *may* be relevant. *Teamsters* v. *United States*, 431 U.S. 324 339 (1977). As the Court put it, "[t]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life." *Id.* However, even assuming that this is a pattern and practice discrimination case, it is within the discretion of the trial judge to determine whether the evidence is unfairly prejudicial, confusing, misleading or an undue waste of time.

Federal Rule of Evidence 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Tenth Circuit impermissibly limited this broad authority. It rejected Sprint's argument that "allowing the evidence would prejudice Sprint because it would result in Sprint having to defend multiple claims of discrimination." It held that, "to be sure, *the district court retains its power to limit cumulative and marginally relevant testimony.* But otherwise we disagree." Pet. App 15a (emphasis added)

In sum, the majority opinion goes too far by taking away the discretion of the trial court to exclude "me too" evidence that is unfairly prejudicial, confusing or a waste of time. As the dissent points out, the majority opinion appears to create a *per se* rule that all "me too" evidence must be admitted in an employment discrimination case. Pet. App 20a, 23a. Yet Rule 403 grants the trial judge the discretion to admit or not admit relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence."

As this Court stated in *United States* v. *Abel*, 469 U.S. 45, 54 (U.S. 1984), "[a] district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules." However, after the Circuit Court decision in this case, a district court in the Tenth Circuit can refuse to admit "me too" evidence only if the court finds the evidence "cumulative" or "marginally relevant." The Tenth Circuit has taken away the district court's "wide discretion" and requires the trial judge to admit "me too" evidence even if she believes it is unfairly prejudicial, or confusing or a waste of time. The district court's order was within the discretion granted the court by FRE 403 and should not have been overturned.

CONCLUSION

For the reasons stated, this Court should reverse the ruling below.

Respectfully submitted,

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